No. 218 T.D.

Brief of Blakeman for P.C.

CASE No. 218.

Filed Dec. 28, 1896.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

THE ALASKA TREADWELL GOLD MINING COMPANY,
Plaintiff in Error,

vs.

PATRICK WHELAN,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

T. Z. BLAKEMAN,
Attorney for Plaintiff in Error.

Filed this.....day of December, 1896.

JAS. H. MCKENNEY, *Clerk.*

By.....

Deputy Clerk.

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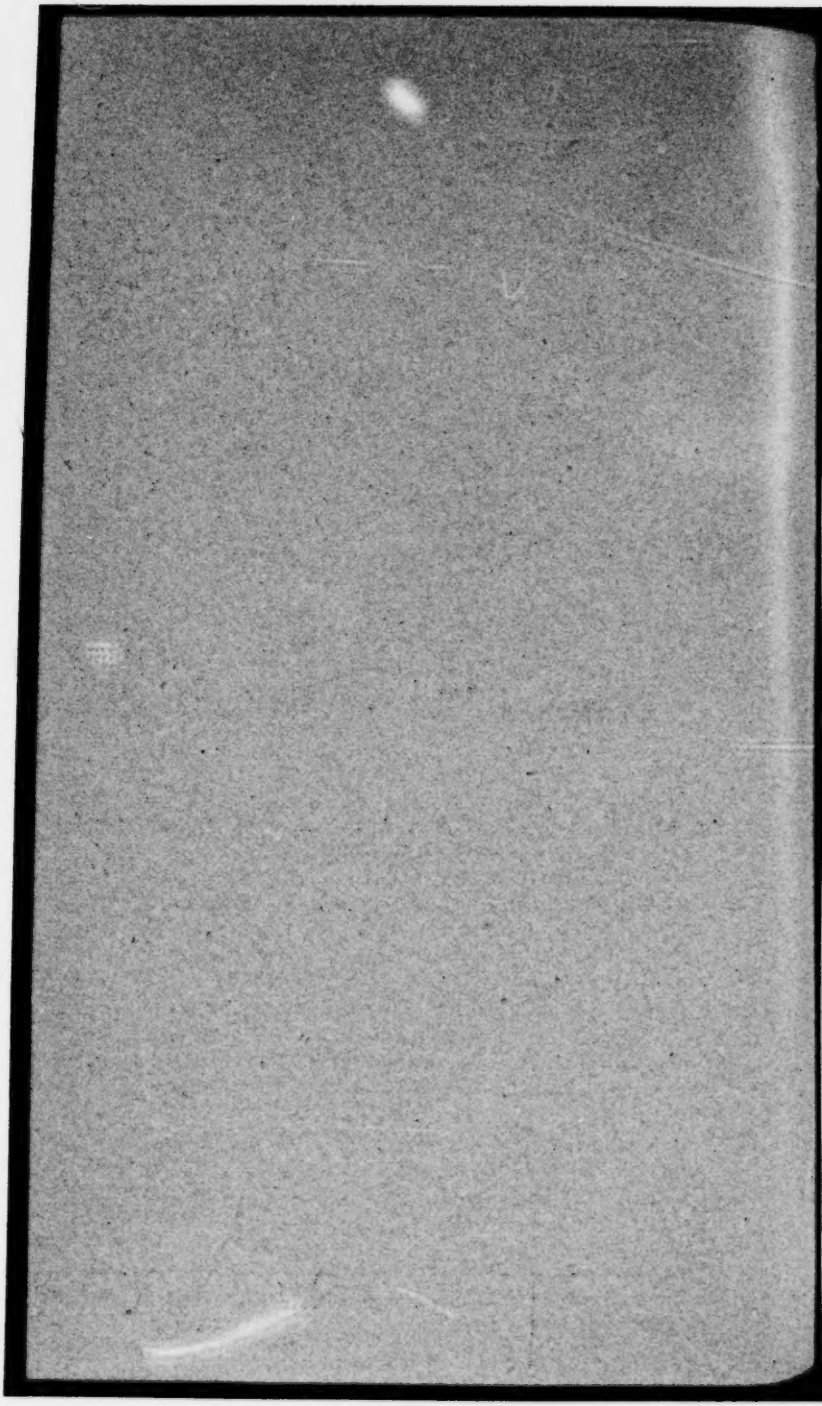

IN THE

Supreme Court of the United States.

No. 215, October Term, 1896.

THE ALASKA TREADWELL GOLD MINING COMPANY,
Plaintiff in Error,

vs.

PATRICK WHELAN,
Defendant in Error.

Statement for Plaintiff in Error.

This action was begun January 22, 1892, in the District Court for Alaska to recover damages for personal injuries received by the defendant in error while a laborer in the service of the plaintiff in error at its mines in Alaska.

The defendant in error alleged in his complaint that he had been damaged in the sum of twenty thousand dollars, and demanded judgment for that sum.

The plaintiff in error in its answer denied the acts of negligence charged, and alleged that the injury was caused by, first, the negligence of a co-employee, and, second, by the negligence of the defendant in error himself.

There was a trial before a jury and a verdict for plaintiff in the sum of two thousand nine hundred and fifty dollars, and judgment accordingly. On the 21st day of November, 1893, the United States Circuit of Appeals for the Ninth Circuit granted the defendant in said action a writ of error to said District Court of Alaska, and said case was by said writ brought to said Court of Appeals for review. The case was heard by said Court of Appeals on its merits, and the judgment of the District Court of Alaska affirmed October 2, 1894 (rec. p. 126).

And the case has been brought to this court on writ of error to said Court of Appeals.

MATERIAL FACTS SHOWN BY THE EVIDENCE.

[References to record are to original or side pages.]

The business of the mining company at Douglas Island was divided into three departments, to wit:

The mine, the mill and the chlorination works. The business generally was under the control of a general manager, and each department had a foreman or superintendent under said general manager (p. 84 of record). The mine department had three shifts or gangs of workmen—two day and one night shift. The shifts had separate bosses. One Sam Finley was the boss of the night shift, and in that shift the plaintiff worked (p. 69 of record). Plaintiff was forty-six years of age; his duty was to break rock and get it ready to go through the chutes to be loaded into cars for conveyance to the mill, and he had been so employed for six months when the accident occurred, on November 23, 1891 (p. 26 of record). In a place called the "pit" the quartz rock blasted from the ledges was thrown, where it was broken into small pieces and made ready for the mill.

From the "pit" several chutes led downward into a tunnel, in which there was a railroad track leading out to the mill and on which cars were run to receive the broken rock from the chutes. The lower end of the chutes, which were several feet below the floor of the pit, had gates to be opened when rock was to be drawn from the chutes into the cars.

Chute No. 17 opened into the pit near the west wall of the pit. On the night of November 23d said chute was full of broken rock, and rock was also piled over it several feet deep on the floor of the pit. On the top of this pile were some large pieces of rock, and early in the evening the plaintiff and a companion laborer, Archie McCormick, were directed by the said boss Finley to break the said large pieces of rock over chute No. 17.

It was Finley's duty to direct when rock was to be drawn from any particular chute. It was customary, and in accordance with a rule of the company, for Finley to go up into the pit and notify the rockbreakers when he was going to draw from any particular chute, so that they might stand aside from that chute.

The plaintiff testified that Finley did not come back into the pit after putting him and McCormick to work over chute 17 about 9 o'clock that night, and that about two hours thereafter the rock from said chute was drawn and he was carried through with the rock.

McCormick, plaintiff's companion workman, testified that Finley came back into the pit about 10 o'clock, and motioned and called for them to come off the pile over No. 17 ; that he complied and was told by Finley to break rock at another place ; that the plaintiff came down off the pile over No. 17 with him, but that he did not know whether plaintiff heard or saw Finley or not ; that Finley then left the pit again ; that plaintiff went back to breaking rock over No. 17, and about half an hour or an hour thereafter No. 17 was drawn and plaintiff went through with the rock.

Finley testified that he went back into the pit about 10 o'clock and called plaintiff and McCormick off the pile over chute No. 17 ; told them that he was going to draw from that chute, and put them to work in another part of the pit ; that he then left the pit again, and in about twenty minutes ordered No. 17 to be drawn.

The plaintiff testified that Finley always, prior to this, came and notified them when he was going to draw from any chute ; that such was Finley's custom, and that it was a rule of the company that the shift boss should notify the men in the pit what chute he intended to draw from, and when (p. 39).

The only evidence submitted by the plaintiff was his own testimony.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court denied the following motion for nonsuit made by defendant's attorney at close of plaintiff's case, to wit :

" I make the motion for a nonsuit on that ground that the " evidence of the plaintiff discloses that he was an employee of " the defendant, and that upon his testimony the evidence " shows that the negligence, if any, which caused the accident " was the negligence of a co-employee, to wit, Sam Finley ; " and that, therefore, the company is not liable " (p. 40).

The Court also refused to direct the jury to return a verdict for defendant, at the motion of defendant's counsel, made at the close of the evidence, as follows :

" First. That it appears from the testimony that the neg- " ligence, if any, which caused the accident to the plaintiff " and the consequent injuries, are the result of the negligence " of a co-employee, or fellow-workman, Sam Finley, for " which the defendant is not liable.

" Second. That it appears from the testimony that the " plaintiff contributed to the accident himself by carelessly

" and negligently walking over the top or mouth of the chute " after he had warning that rock was to be drawn from there " (p. 100).

2. The evidence is insufficient to justify or sustain the verdict in this: (1) It shows that the cause of the injury to plaintiff was the negligence of plaintiff's fellow-servant; and (2) plaintiff's own negligence.

3. The Court erred in refusing to give the following instruction to the jury requested by defendant, marked 2, to wit: "To " make the defendant liable in this case for the injury received " by the plaintiff, the evidence must satisfy you that the de- " fendant was guilty of negligence causing the injury to plaintiff; " and if you find from the evidence that the company, by its " general manager or by its superintendent of the men under " him, directed any one of the employees or workmen of de- " fendant to notify the men working about the chutes in the " pit whenever rock was to be drawn from the chutes into the " train, and that this was a standing rule of the defendant " company, then your verdict must be for the defendant, " whether such employee gave the notice and carried out the " rule or not, as, in that case, the negligence of such employee " in not giving the notice would not be the negligence of the " defendant " (p. 101).

The Court also erred in modifying said instruction and giving the same as modified. The modification consisted in adding to said instructions as follows, to wit: " Unless you also find from " the evidence that the defendant was guilty of gross negligence " in employing as such workmen or employees unsuitable, un- " skilled and unreliable persons."

4. The Court erred in refusing to give to the jury the following instruction requested by defendant, marked 3, to wit:

" The master is never liable for injuries received by a work- " man in its employ if the injuries are the result of any negli- " gence on the part of the person injured. That is what the " law calls contributory negligence; and if you find from the " evidence that the accident which caused the plaintiff's injuries " was in any manner the result of want of ordinary care on the " part of the plaintiff to avoid the accident and escape the " damage, the plaintiff cannot recover, and your verdict must " be for the defendant " (p. 102).

The Court modified such instruction by adding thereto the following words, to wit: " Unless you also find from the evi- " dence that the defendant was guilty of gross negligence and " the plaintiff's negligence was slight," and gave the same as modified against the objection of the defendant, and thereby the Court erred.

Points and Authorities for Plaintiff in Error.

I.

THE COURT ERRED IN MODIFYING INSTRUCTION NO. 2.

The Court refused to give instruction No. 2, as requested by defendant, but added thereto, against the objections of defendant, words which injected into the case a new element of liability, which was not supported by the pleading or by any evidence, to wit: "Unless you find from the evidence that "the defendant was guilty of gross negligence in employing "as such workmen or employees unsuitable, unskilled and unreliable persons" (rec., p. 101).

The modification of the instruction was not only erroneous but was capable of having a most pernicious effect on the jury. It injected into the case a new cause of action or ground of recovery, to wit, negligence of defendant in selecting its employees. Neither the pleadings nor evidence supported or suggested this new cause of action.

"One injured by the negligence of a fellow-servant must "*allege and prove* his ignorance of the latter's negligent habits. "He must *allege* want of care in engaging the servant, or that "he was retained after notice of his shortcomings."

Lake Shore Ry. Co. vs. Stupak, 108 Ind., 1.
Ind. Ry. Co. vs. Daily, 110 Ind., 75.
Laning vs. New York, etc., R. Co., 49 N. Y., 521.
S. C., 10 Am. Rep., 417.
Mich., etc., R. Co., vs. Dolan, 32 Mich., 510.

The plaintiff's testimony showed that Finley was not of negligent habits. Finley had never failed before to notify him (pp. 30, 33 and 39, record).

"A single act of negligence does not necessarily charge the "master with notice of the servant's incompetency."

Baltimore E. Co. vs. Neal, 65 Md., 438.

The modification of the instruction was not supported or justified by a line of pleading or a word of evidence.

Who can say that the verdict of the jurors was not the result of a conclusion of theirs, in the language of the Judge's charge, " that the defendant was guilty of gross negligence in employ- " ing, as such workmen or employees unsuitable, unskilled and " unreliable persons." The error was repeated and emphasized by modifying Instruction No. 3 in same manner (rec., p. 102).

II.

INSUFFICIENCY OF EVIDENCE.

The evidence is not only insufficient to sustain the verdict, but shows affirmatively without conflict *that the cause of the injury to plaintiff was the negligence of shift boss* Finley in not notifying plaintiff when the rock was to be drawn from the chute. This point embraces specifications of error 1 and 2 aforesaid, and assignment of errors 3, 4, 5 and 6 (p. 115 of record).

The trial Court considered the point involved a " close question," and was satisfied that if Finley and the plaintiff were fellow-servants within the meaning of the rule applicable to injuries caused by negligence of fellow-servants, the plaintiff was not entitled to recover (see Court's ruling on motion for nonsuit, pp. 40, 41 of record)

At the trial great stress seems to have been placed upon the fact that Finley was a boss or foreman of the night shift of workmen at the mine. While the plaintiff attempted to show that on one or two occasions Finley had discharged a laborer, the evidence without conflict shows that Finley was only the boss of a night shift of workmen, and his duties were: 1st, to see that the men did their work; and, 2d, to direct when rock was to be drawn from the chutes, and to notify the men in the pit which chute was to be drawn, so that they might stand aside from it.

Finley's position in the service of the company was that of a simple employee having specific duties defined by his superior, the foreman of the mine (pp. 69 and 70 of record).

Finley, though an employee of superior grade to the plaintiff, was two degrees removed from the management of the business of the common master.

Over Finley there was the foreman of the mine department, and over said foreman there was the general manager or superintendent of the entire business.

Finley being of a superior grade to plaintiff in the common employment, and in certain respects having the authority to direct the movements of the plaintiff, was no evidence that he was not the fellow-servant of the plaintiff in respect to the cause of the accident.

The cause of the accident was Finley's neglect of the rule of the company to notify plaintiff before he drew the rock from chute No. 17.

Plaintiff testified that he knew the rule of the company in this respect; that Finley was accustomed to perform that duty; that he had always performed it properly theretofore, and that he relied upon Finley performing his said duty on the night in question (see pp. 39, 33, 30 of record).

Mr. Beach, in his work on Contributory Negligence, sec. 326, has stated the rule to determine who are fellow-servants, as follows:

"The mere fact that one of a number of servants who are in "the same line of employment for a common master has the "power to control and direct the actions of the others with "respect to such employment, will not of itself render the "master liable for the negligence of the governing servant.

"On the other hand, the mere fact that the governing ser- "vant sometimes, or generally, labors with the others as a "common hand, will not of itself exonerate the master from "liability for the former's negligence in the exercise of his "authority over the others. Every case in this respect must "depend upon its own circumstances. If the negligence com- "plained of was some act done or omitted by one having such "authority which relates to his duties as a co-laborer with those "under his control, and which might just as readily have hap- "pened with one of them having no such authority, the com- "mon master will not be liable."

Chicago, etc., R. Co. vs. May, 108 Ill., 302.

Mr. McKinney on Fellow-servants, sec. 23, has stated the rule as follows:

"The true test, it is believed, whether an employee occupies "the position of a fellow-servant to another employee, or is the "representative of the master, is to be found, not from the "grade or rank of the offending or injured servant, but it is to "be determined by the character of the act being performed by

" the offending servant, by which another employee is injured; " *or in other words, whether the person whose status is in question* " *is charged with the performance of a duty which properly belongs* " *to the master.*"

The work of raising the gate and drawing the rock from the chutes and of going into the pit above and notifying the workmen there to stand aside from the particulur chute to be drawn, was a menial duty, and was no more the duty of the employer than the breaking of the rock to fill the chutes. It was work that the commonest laborer could perform. It was work specifically assigned to Finley under a rule of the company, and the plaintiff knew of the rule and of Finley's duty thereunder (pages 30, 33 and 39 of the record).

The Supreme Court of Massachusetts has stated the rule as follows:

" The rule of law that a servant cannot maintain an action " against his master for an injury caused by the fault or negli- " gence of a fellow-servant is not confined to the case of two " servants working in company or having opportunity to con- " trol or influence the conduct of each other, but extends to " every case in which the two, deriving their authority and " compensation from the same source, are engaged in the same " business, though in different departments of duty; and it " makes no difference that the servant whose negligence causes " the injury is a sub-manager or foreman of higher grade or " greater authority than the plaintiff."

Holden vs. Fitchburg R. Co., 129 Mass., p. 268.

The Supreme Court of the United States has favored the rule as laid down by the Supreme Court of Massachusetts.

Randall vs. Baltimore & Ohio R. R. Co., 109 U. S., 484.

The Court in said case stated a reason for the rule especially applicable to the case at bar, to wit: " The duties of the two " (employees) bring them to work at the same place at the " same time, so that the negligence of the one *in doing his* " *work* may injure the other in doing his work."

The italics are ours and call attention to the fact that in the case at bar it was the negligence of Finley *in doing his work* that caused the injury.

The case of Randall vs. B. & O. R. R., supra, is authority for the proposition that the trial court in a proper case ought to direct a verdict for the defendant.

III.

JURISDICTION.

No question as to the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit was raised by either party, nor did said Court, in its opinion filed, touch upon the subject (rec., p. 126).

1. The presumption, however, is that the said Court of Appeals determined that it had jurisdiction. It had that power (McLish vs. Roff, 141 U. S., 663). And no one has sought to have this Court review that determination. In the case of Northern Pacific R. R. vs. Amato, 144 U. S., 465 at 472, defendant in error on motion to dismiss, in this Court, contended that as the question of jurisdiction of the Circuit Court was raised by the defendant in the Circuit Court of Appeals the case might have been brought by writ of error directly from the Circuit Court to this Court, under sec. 5 of the Act creating the Circuit Court of Appeals. This Court, in denying the motion to dismiss, said: "But it does not appear by the record that "on the trial the defendant made any objection to the jurisdic-"tion of the Circuit Court." And even "if a writ of error "from this Court to the Circuit could have been taken, yet "as the defendant did not take such a writ of error, but "took one from the Circuit Court of Appeals to the Circuit "Court, the plaintiff cannot be heard to assert, as the ground "of this motion, the fact that the defendant might have taken "a writ of error from this Court to the Circuit Court."

2. The only question, therefore, it seems, for this Court to consider on this subject is, does the statute provide for a review by this Court of cases in which the judgment of the Circuit Court of Appeals is not final.

The said case of Northern Pacific R. R. vs. Amato (144 U. S., p. 471) is authority on the question. In that case this Court upheld its jurisdiction on the ground that "the jurisdiction of "the Circuit Court was not dependent entirely upon the fact "that the opposite parties to the suit were one of them an alien "and the other a citizen of the United States, or one of them "a citizen of one State and the other a citizen of a different "State."

In the case at bar the jurisdiction of the District Court of Alaska was not "dependent entirely" upon the citizenship of the parties. The judgment of the Circuit Court of Appeals therefore not being final and the matter in controversy exceeding one thousand dollars, besides costs, the case is reviewable in this Court by writ of error to the Circuit Court of Appeals (sec. 6, Act. Mch. 3, 1891).

We submit, however, that this Court has decided that the final judgments, generally, of the District Court of Alaska are reviewable in the Circuit Court of Appeals for the Ninth Circuit.

Steamer Coquitlam vs. United States, 163 U. S., 347.

That case came before this Court "upon a certificate from "the Circuit Court of Appeals as to its jurisdiction to entertain "an appeal from the decree of the District Court of Alaska." (We quote from the Court's statement of the certificate.)

It is true that the Coquitlam case was an admiralty case; but this Court declared the jurisdiction of said Circuit Court of Appeals in general terms. Said the Court:

"Looking at the whole scope of the Act of 1891, we do not "doubt that Congress contemplated that the final orders and "decrees of the courts of last resort in organized Terri- "tories of the United States,—by whatever name those courts "were designated in legislative enactments,—should be reviewed "by the proper Circuit Court of Appeals, leaving to this Court "the assignment of the respective Territories among the exist- "ing circuits."

4. Even if the said Circuit Court of Appeals had not jurisdiction in the case at bar, and this Court had, by writ of error direct to the District Court of Alaska, under section 7 of the Act providing a civil government for Alaska (23 Stat. L., p. 24), still the case is here, by writ of error with proper assignments of error, and the jurisdiction exists in this Court to hear and determine the case.

Respectfully submitted,

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